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BEFORE THE INSURANCE COMMISSIONER
FOR THE STATE OF WASHINGTON

In the Matter of

THE APPLICATION REGARDING
THE CONVERSION AND
ACQUISITION OF CONTROL OF
PREMERA BLUE CROSS AND ITS
AFFILIATES

No. G02-45

OIC STAFF'S RESPONSE TO
INTERVENERS' MOTION FOR
EMERGENCY HEARING

COMES NOW the Office of the Insurance Commissioner Staff ("OIC Staff"), by and through its attorneys of record, MELANIE C. deLEON, Assistant Attorney General, and JOHN F. HAMJE, Special Assistant Attorney General, and files this Response to Interveners' Motion for Emergency Hearing. This hearing is currently set for argument on Wednesday, December 10, 2003.

The Interveners have requested that the Insurance Commissioner schedule an emergency hearing to hear argument on the following two issues:

- (1) whether Premera Blue Cross and its affiliates ("Premera") will be permitted to submit substantive changes to its Form A Statement by way of amendment; and
- (2) whether submitting substantive changes would, in effect, result in a new Form A restarting the proceedings that were commenced when Premera first filed its Form A Statement in September 2002.

1 Interveners' Motion at 1. The Interveners further ask the Commissioner to issue an order
2 requiring Premera to withdraw its Form A Statement and submit a new Form A Statement if it
3 decides to make any changes in the pending Form A Statement. *Id.* at 7. The Interveners'
4 Motion should be denied because it is premature and provides no authority for granting the
5 relief requested.

6 1. FACTS

7 OIC Staff agree that the Interveners, through their counsel, were apprised of certain
8 conversations occurring between Premera and OIC Staff concerning the procedural aspects of
9 this matter during the week of November 24 – 26, 2003. Interveners' counsel was told that
10 the discussions were generally limited to consideration of an extension of time of
11 approximately 60 days. They were advised that the purpose for such an extension would be to
12 allow Premera and OIC Staff to continue previous discussions relating to substantive issues
13 about the Form A Statement raised by the OIC Staff's Consultants. The end result of any
14 discussions may be an amendment to the Premera Form A Statement. Interveners' counsel
15 shared their views and expressed some concerns about the procedural discussions. *Id.*

16 OIC Staff counsel also shared the underlying rationale for the procedural discussions.
17 Premera had elected not to amend its Form A Statement by the October 15th deadline
18 established in the Thirteenth Order. At that time, Premera insisted that changes could be
19 effected to the Form A Statement by the presentation of conditions to the Commissioner to
20 which Premera would not object if imposed upon any approval of the Form A Statement.¹

21 This belief by Premera meant that the Form A Statement could be a "moving target"
22 through the proceedings. Arguably, neither the other parties nor the Commissioner would
23 know what constituted the terms in Premera's Form A Statement until Premera finally
24 presented the conditions, potentially as late as February 9, 2004.² Proceeding in this fashion

25 ¹ See, e.g., Premera's Motion at 2, footnote 1.

26 ² The Commissioner's deadline for post-hearing submissions, after the adjudicative hearing.

1 could effectively prevent the OIC Staff, the Interveners and the public from being able to
2 review, evaluate and properly comment on the Form A Statement with any conditions
3 submitted by Premera. Although the Commissioner had ruled that he would “consider the
4 terms of the transaction as described in the Form A Statement submitted by Premera as of
5 October 15, 2003,” he also stated that he would “consider all of the admitted evidence
6 submitted by the parties during the rest of these proceedings regarding those terms” including
7 “the terms of the detailed stock ownership plan submitted on October 17, 2003....”
8 Eighteenth Order at 2.

9 Finally, the Commissioner has previously urged the OIC Staff and Premera to continue
10 discussions for the purpose of “simplifying the issues.” *See* RCW 34.05.431; WAC 10-08-
11 130. Given this direction, the OIC Staff continued to consider possible solutions that would
12 protect the rights and entitlements of the public as well as the Interveners to timely notice of
13 the terms of the Form A Statement thereby permitting their effective and meaningful
14 participation. The consideration of an extension of the final order date appeared to be
15 appropriate to permit discussion and possible amendment of the Form A Statement while
16 ensuring adequate time for review, evaluation and comment by the OIC Staff, the Interveners
17 and the public.³

18 2. ARGUMENT

19 The Interveners request that the Commissioner enter an order that requires Premera to
20 withdraw the Form A Statement and refile if it “proposes, requests or agrees to substantive
21 changes, revisions, amendments, supplements or conditions” to the Form A Statement. This
22 request is premature because Premera has not proposed to make any changes to its Form A
23 Statement. *See* Premera’s Motion at 3, footnote 2. On that ground alone, the relief requested
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25 ³ The OIC Staff concurs with the Interveners’ statement that “[d]ue process and basic fairness requires
26 [sic] that Interveners and the public participate in a proceeding based upon a known and public proposal.”
Interveners’ Motion at 3.

1 by the Interveners should be denied. While there may be a time when the aggregation of
2 changes to the Form A Statement may require withdrawal and the filing of a new Form A
3 Statement, now is not that time.

4 Additionally, the Interveners have provided no legal authority for an order of this kind.
5 Quite to the contrary, the Holding Company Acts that govern these proceedings specifically
6 contemplate amendment of a Form A Statement. WAC 284-18-370 and 284-18A-360 both
7 require Premera to promptly amend the Form A Statement when information provided in the
8 statement changes. The only time limitation reflected in the regulations as to submitting
9 changes is that it must be done “prior to the commissioner’s disposition of the application.”
10 *Id.* The Commissioner, by his own order, modified this time limitation for this proceeding by
11 establishing a deadline of October 15, 2003 for submission of any changes to the Form A
12 Statement. *See* Thirteenth Order dated September 18, 2003 at 2. In this Order, the
13 Commissioner acted within his lawful authority as the presiding officer and recognized the
14 right and entitlement of the Interveners, the public and the OIC Staff to timely notice of the
15 terms of the Form A Statement. *See* WAC 10-08-130.

16 The Interveners argue that, since the public forums have already been held in Spokane
17 and Yakima, the adjudicative hearing has already begun, claiming that these forums “bear all
18 the hallmarks of a formal administrative hearing (testimony under oath and the opportunity for
19 cross examination). . . .” Interveners’ Motion at 6. Therefore, it is argued, that Premera is too
20 late to propose changes. *Id.* Again, Premera has yet to propose any changes to the Form A
21 Statement and it is conceivable that none will be proposed. But, more significantly, the public
22 forums, as important as they may be, do not constitute the commencement of the adjudicative
23 proceeding because they are not required by a statutory or constitutional provision. RCW
24 34.05.010(1). The Commissioner exercised his discretion by holding these forums for the
25 purpose of hearing the comments and concerns of members of the public who might otherwise
26 not be able to participate. The forums are not mandated by law.

1 Nor does the filing of Premera's Motion change any term of the Form A Statement. In
2 essence it is a motion for continuance. The Commissioner may grant a continuance on his
3 own motion or on the timely request of a party upon a showing of good cause. WAC 10-08-
4 090. Additionally, the Interveners appear to claim that a "back-room deal" may be struck in
5 connection with the Form A Statement. Interveners' Motion at 6. Given the procedure
6 established by the Commissioner in the First Order, this is not possible.

7 During these proceedings, the Commissioner sits as presiding officer and is charged
8 with adjudicating the merits of the Form A Statement. He has previously stated that the
9 proceedings will be conducted in a manner that is as transparent as possible.⁴ To do this, he
10 established an OIC Review Team and separated the functions between himself and those
11 assisting him from those of the Team. In this way, he can impartially judge the Form A
12 Statement considering only the evidence presented in conformity with the Holding Company
13 Acts and the Administrative Procedure Act. First Order at 3. At the same time, he granted the
14 Team party status in the proceedings as the "OIC Staff." *Id.* at 4.

15 The OIC Staff, as a party to these proceedings, cannot bind the Commissioner to any
16 agreement that it may enter into with any other party. Any agreement between or among the
17 parties must be approved by the Commissioner, or the Special Master, before it can be
18 implemented. *See* RCW 34.05.437(1). Additionally, the Commissioner may hold a public
19 hearing to consider the argument of counsel concerning the matter. The Commissioner will
20 then issue an order regarding the request as he deems appropriate under the law. To date,
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23 ⁴ "We are also committed to meaningful public involvement as part of our regulatory review process."
24 News Release (May 31, 2002). "From the beginning of this process I've felt strongly about the importance of not
25 only keeping the public informed on how this matter is proceeding, but also hearing about questions and concerns
26 from consumers and policyholders...." News Release (Feb. 10, 2003). "As I have repeatedly stressed, the nature
of this matter requires the greatest possible transparency to the public and any appearance to the contrary raises
serious concerns." Twenty-first Order (Dec. 4, 2003).

1 each step in the proceedings has taken place like this and in full view of the public. This
2 extends to stipulations simplifying the issues which require the approval of the Commissioner
3 before they may be given effect. *See* RCW 34.05.431(1); WAC 10-08-130(1), (3). The
4 process has not and will not permit a “back-room deal.”

5 Finally, the OIC Staff has consistently stressed that it is committed to taking all
6 necessary and reasonable steps to ensure that the record for consideration by the
7 Commissioner is complete. That commitment has included presentation of proposed
8 agreements or stipulations. The Commissioner must be provided with sufficient information
9 and/or evidence to permit an independent determination of the merits of each proposal.
10 Therefore, the OIC Staff has not and will not attempt to present a proposal without a full
11 explanation of its significance. In any case, if the Commissioner is not satisfied that a
12 proposal has been sufficiently briefed, he may require that the parties submit additional
13 information.

14 As a party to the proceedings, the OIC Staff may enter into discussions with any other
15 party about any matters relevant to the proceedings, particularly those affecting procedure.
16 The OIC Staff has communicated frequently with all parties about a wide variety of subjects
17 during the course of this proceeding. The OIC Staff is generally aware that the other parties,
18 including the Interveners, have from time to time engaged in discussions with each other as
19 well.
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3 **3. CONCLUSION**

4 The Interveners' Motion should be denied in all respects for the reasons that it is
5 premature and, even if it were not, there is no authority supporting the Interveners' request for
6 relief.

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8 REPSECTFULLY SUBMITTED this 8th day of December, 2003.

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